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CURRENT TOPICS.

In *First National Bank v Northern Railroad*, recently decided by the Supreme Court of New Hampshire, it was held that a common carrier by railroad, who delivers goods entrusted to him for carriage without production of the bill of lading describing the goods, is liable in trover for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at their destination. It is well settled that the transfer of a bill of lading to a *bona fide* purchaser for value, or as security to one who makes advances on the goods described in the bill, entitles the assignee or pledgee to the possession of such goods subject only to the lien of the carrier for freight, or to the claims of a consignee into whose possession the property may have come before transfer of the bill of lading. Lickbarrow v. Mason, 6 East 21; Walter v. Ross, 2 Wash. 283, Ryberg v. Snell, Id. 294; Winslow v. Norton, 29 Me. 419; Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 360; s. c. 18 Am. Rep. 299; and the delivery of the bill of lading takes the place of delivery of the goods, for no delivery of the latter is practicable at the time, and the symbolical delivery of the bill is sufficient to pass the title. Ricker v. Cross, 5 N. H. 570; Portland Bank v. Stacey, 4 Mass. 663; Pratt v. Parkman, 24 Pick. 46; Gardner v. Howland, 2 Pick. 601.

The case of *Reg v. Hermann*, recently before the English Court of Crown Cases Reserved, is somewhat singular in having caused a difference of opinion among the judges on a simple question of construction. The prisoner had fraudulently filed the edges of a genuine sovereign so as to reduce the weight below the current weight, and having then added a new milling, had attempted to pass it as a genuine coin. Three of the judges held that the coin thus altered was a "counterfeit sovereign," within the meaning of that phrase in the statute, while two of them were of a contrary opinion. STEPHEN, J, said: "I can not bring myself to the conclusion that these coins were counterfeit, within the meaning of the statute. They were in the beginning genuine coins, and, doubtless, whoever lightened them fraudulently committed an offense; but I do not find anything in the act which goes the length of saying that a coin thus fraudulently lightened is a counterfeit coin, or that a person passing coin so lightened is guilty of any offense at all. The prisoner had adopted means of concealing the fact that these coins, otherwise genuine, had been lightened, and the whole question therefore is whether the coins were thereby rendered counterfeit. I think it would be rather an artificial straining of the word to hold that they were." HUDDLESTON, B.—"It appears to me that when the milling was removed from these coins they ceased to be good and current coin; and that the prisoner, by putting on a milling for the purpose of making them apparently resemble current coin, and by passing them in that condition, has brought himself within the words of the act." POLLOCK, B.—"It seems to me that a sovereign which has had the milling taken off it for the purpose of deteriorating and effacing the coin is, within the meaning of the section, a false and counterfeit coin." LUSH, J.—"I am of opinion that to hold these coins to be counterfeit would be to strain the meaning of the section. If that section had stood alone, I should certainly have thought that what was issued as a good coin could not, by any deduction or clipping, be made into a counterfeit coin; it could only be made so by the importation of something in the nature of base metal. The word 'counterfeit' involves the idea of spurious imitation by unauthorized persons. Then the interpretation clause extends the meaning of the word so as to include the case of current coin so altered as to be intended to pass for some coin of a higher denomination; so that a gilded farthing would, if tendered as a sovereign, be a counterfeit coin, but only by virtue of this interpretation clause, not by virtue of anything contained elsewhere in the act; but here the coins professed to pass for coins of the same denomination. Then it is said that, because the prisoner added the milling, he turned the genuine sovereign into a counterfeit one; but I do not think that this argument ought to prevail, unless spurious or base metal had been add-

ed." COLERIDGE, C. J.—"I should be content to say that this sovereign, having been made into something which is not a sovereign, is a counterfeit coin, within the strict and grammatical meaning of the word, something *factum contra quod oportuit*. But I am also content to base my judgment upon the ordinary sense in which the word is used, and which implies something 'imitated.' I think the coins, when lightened, ceased to be sovereigns; then, by the fraudulent act of the prisoner, they were made to resemble sovereigns, still not being sovereigns; and I think that every coin to which anything has been done which has the effect of making it pass for what it is not, may be said to be a counterfeit coin."

THE EIGHTH VOLUME OF THE AMERICAN DECISIONS.*

The latest volume of this admirable series contains decisions from seven States, originally printed in the following reports: 1 N. H.; 15 & 16 Mass.; 3 Conn.; 15, 16 & 17 Johns.; 3 & 4 Johns. Ch.; 2 South. (N. J.) 3 & 4 Serg. & Rawle (Pa.); and 6 Munf. (Va.) The cases were decided between the years 1817 and 1820. The notes are, as usual, very full and valuable. Particularly worth mention are the annotations to the cases on replevin (p. 109), public right on highways (p. 125), acknowledgement of debt (p. 162), delivery by carrier (p. 214), partnership property (p 297), promise to pay note after maturity (p. 304), consideration (p. 366), liability of *quasi*-corporations for negligence (p. 442), *lex loci contractus* (p. 490), foreign assignments (p. 597), illegal contracts (p. 691), and testimony of absent witnesses (p. 717).

Among the cases of general interest we note the following: The case of *Medway v. Needham*, 16 Mass. 157, though not now the law in the State in which it was decided, is entitled to a place in the series on account of the frequent reference made to it in later cases. It was there held by the Supreme Judicial Court of Massachusetts that a marriage valid by the laws of the country where it was entered into is valid everywhere, and this principle was held to apply where the parties went into another State for the purpose of evading the laws of their own State which prohibited the marriage, and after their marriage returned to their own State. Parker, C. J., while admitting that a fraudulent evasion of the laws of the country where the parties have their domicil cannot, in the case of ordinary contracts, be protected, thought that an exception must be made in the case of marriage contracts "with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose style in which people so situated would live," and referred to the English cases in the ecclesiastical courts as sustaining his view. But in Brook v. Brook, 9 H. L. 193, the English House of Lords expressed the opinion that "the American decision of Medway v. Needham cannot be treated as proceeding on sound principles of law." The whole subject is elaborately discussed by the Court of Appeals of Virginia in the recent case of Kinney v. Com., 7 Cent. L. J. 330, where the contrary doctrine is maintained.

In *Merrill v. Sherburne*, 1 N. H. 199, the Supreme Court of New Hampshire declared void an act of the legislature awarding a new trial in a case which had been once decided in a court of law. Woodbury, J., said:

"The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers. It is a judgment in relation to a private controversy, affects what has already happened, and results from a comparison of evidence and claims with the existing laws. It will not be denied that the consideration and decision by the superior court of the motion for this same new trial was an exercise of judicial power. If so, a consideration and decision upon the same subject by the legislature must be an exercise of power of the same description; for what is in its nature judicial to-day, must be judicial tomorrow and forever. The circumstance also that the legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another by holding that trial before themselves, the first act did not become any more or less a judicial one."

In *Manufacturers Bank v. Gore*, 15 Mass. 75, a partner on a note signed by the firm, by means of a forged indorsement of which his co-partner was ignorant, obtained money from a bank which was placed to the credit of the firm. Before the maturity of the note, it was

*The American Decisions, containing all the cases of general value and authority, decided in the courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and annotated by JOHN PROFFATT, LL. B. Vol. VIII. San Francisco: A. L. Bancroft & Co. 1879.

discovered that the indorsement was forged. It was held that the amount could be recovered immediately in an action against both partners. "We think the principle," said Parker, C. J., "that when by means of a felony one has been deprived of his property, the civil remedy is merged in the felony, if existing in full force in this country in the manner laid down in some of the English authorities, does not apply to this action which is not founded upon felony, but upon a common contract for the loan of money in which the lender has been deceived by the borrower and deprived of the security upon which the loan was assented to."

Wheeler v. Patterson, 1 N. H. 88, holds that an action on the case will not lie against the moderator of a town meeting for rejecting the vote of a qualified elector, without proof of malice or improper motives. In *Sherburne v. Shaw*, Id. 157, the same court held that a memorandum of an agreement which did not disclose the terms of the contract and the parties thereto, was not sufficient under the statute of frauds. In a recent decision of the Supreme Court of the United States, published in full in our present issue, this case is referred to by Mr. Justice Miller as having the "most weight in informing our judgment, because it is an authoritative construction of the statute of the State where this contract was made, and where the land is situated to which the contract relates, made by the highest court of that State sixty years ago and never overruled"

Wightman v. Coates, 15 Mass. 1, was an action for breach of promise of marriage, and there being some argument on the point that no such action lay in this country, the chief justice says: "This is not a new doctrine." He adds that several suits of a similar character had already been before him, and recollects more than one while he was at the bar. "Indeed," he concludes, "there is no country in which the relative situation of the sexes and their joint influence on society would render such a principle of jurisprudence more useful or necessary."

Bridge v Hubbard, 15 Mass. 96, holds that where a security is originally void for usury another security substituted therefor is still affected by the original usury. In *Dunham v. Gould*, 16 Johns. 367, it is held that where two persons exchange notes for the purpose of raising money at an interest exceeding the rate allowed by law, A giving his note to B, and receiving B's note in return, together with a commission greater than the legal interest on the note of A, the transaction is but a device to evade the statute, and B's note is void. In this case, Chancellor Kent gives a lengthy historical review of the subject of usury laws.

"If we look back upon history we shall find that there is scarcely any people, ancient or modern, that have not had usury laws. I believe there is not a nation in Europe at this day without them. In ancient Rome, according to Tacitus, usury was discouraged in the earlier period of the republic by the twelve tables which reduced interest to one per cent. It was afterwards lowered to one-half per cent., and finally abolished by the clamors of the people. It was revived in the ages of commerce and luxury, but placed under necessary restrictions. Four or six per cent. was the ordinary interest, eight per cent was allowed for the convenience of commerce, and twelve per cent. might be taken for maratime hazards by the laws of Justinian. * * * But it is not only the civilized and commercial nations of modern Europe and the sage lawgivers of ancient Rome that have regulated the interest of money. It will be deemed a little singular that the same voice against usury should have been raised in the laws of China, in the Hindoo institutes of Menu, in the Koran of Mahomet, and, perhaps, we may say, in the laws of all nations that we know of, whether Greek or barbarian."

After noticing at considerable length the arguments against the policy of such laws, and the reasons which have actuated their enactment, he concludes:

"The statute of usury is constantly interposing its warning voice between the creditor and the debtor, even in their most secret and dangerous negotiations, and teaches a lesson of moderation to the one and offers its protecting arm to the other. I am not willing to withdraw such a sentinel. I have been called to witness, in the course of my official life, too many victims to the weaknesses and to the inflamed passions of men. All sudden and extreme reforms are unwise. We ought not to stretch or to amputate in order to make our institutions fit exactly to any theory. It is better to follow the course and order of Providence and suffer our general system of law, like our habits, to accommodate itself slowly to our necessities, and to vary only with the gradual and almost imperceptible progress of time and experience."

In *Seidenbender v Charles*, 4 S. & R. 151, a scheme for the sale of a tract of land, in lots of unequal value, to be distributed among the purchasers by chance, by means of tickets or numbers bought at a fixed price greatly exceeding that of a majority of the lots, was held to be within the law prohibiting lotteries, although according to the scheme there were no blanks. Property either real or personal, it was said, may be divided by lot without violating the law, provided the parties have a previous interest in the property divided, but not other-

wise. In *Brown v. Brown*, 3 Conn. 299, it is ruled that a person deaf and dumb from his nativity is not legally incapable of executing a deed.

In *Den v. Johnson*, 2 South. 455, which was a controversy over a will, the phrase "of sound and disposing mind and memory," was thus defined by Kirkpatrick, C. J.

"The term 'sound and disposing mind and memory,' so commonly used on this subject, stands opposed not only to idiocy and lunacy, but to all derangement of mind, occasioned by melancholy, grief, sorrow, misfortune, sickness or disease. Every discomposure of the mind, by these causes, will not render one incapable of making a will; it must be such a disclosure, such a derangement, as deprives him of the rational faculties common to man. 'Sound' signifies whole, unbroken, unimpaired, unshattered by disease or otherwise; a 'disposing mind and memory' is a mind and memory which have the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood. Though it has been sometimes said, as has been stated from the books, that if one count ten, tell his name, say the day of the week, or even ask for food, it is a sufficient evidence of a disposing mind, yet such sayings, though they show wills are not lightly to be set aside, can and ought to have but little weight."

The definition of "sound," in the above abstract was criticised in Sloan v. Maxwell, 2 Gr. Ch. 563, where it was said that if that be its meaning "a will can only be made in the spring, or at the latest, in the summer, never in the autumn of life." *Miller v. Miller*, 3 S. & R. 266, holds that a person has a right, by fair argument and persuasion to induce another to make a will, and even to make it in his own favor. In *Miller v. Bates*, 3 S. & R. 490, a person who had not been heard from for fourteen years and nine months was presumed by the court to be dead.

MASTER AND SERVANT— ABANDONMENT OF CONTRACT.

LEOPOLD v. SALKEY.

Supreme Court of Illinois.

[Filed at Ottawa, January 25, 1879.]

A, a salesman, contracted with B, a clothing manufacturer, to work for him for a term of three years at a stated salary. Shortly after A entered upon his work, he was arrested and put in jail for two weeks during the busiest season of B. *Held*, that the arrest of A, though without his fault and his failure to work, necessitating the employment of another in his place, was an abandonment of the contract, and precluded him from recovering damages for B's refusal to take him back.

WALKER, J., delivered the opinion of the court:

This was an action of appellee against appellants upon a written contract under seal, whereby the former agreed to render personal services for the latter during a stipulated term for a price agreed to be paid by the latter.

By the terms of the contract appellee agreed to enter the employ of appellants as superintendent and manager of the manufacturing department of appellants (they being engaged in the manufacturing and selling of boys, youths and children's clothing), in connection with and under the direction of Asher F. Leopold, and, whenever required by appellants' firm, or either member thereof, to assist in the purchase and sale of materials and goods manufactured by the firm, in such manner and at such times as the firm should direct. Appellee also agreed that he would continue in the employ of the firm for a period of three years from the first day of December, 1874, at which time his services were to commence; that during said term he would devote himself entirely to the business of the firm, in the manner as agreed upon, giving his whole time, attention and skill thereto, and at all times work for the best interests of appellants. Appellants, as a compensation therefor, agreed to pay appellee the sum of $3,000 per annum in sums of $250 per month, at the expiration of each month.

Appellee commenced work under the contract on the 1st of December, 1874, and continued to render services thereunder until the 12th of January, 1875, when he was arrested by a United States marshal under an order of the District Court of the United States for the Northern District of this State, and put in jail. He remained in jail until the 25th of the same month, when he was released on bail. Upon being released he returned to appellants' establishment to resume work under the contract, but they having appointed another foreman in his place whilst he was in jail, refused to receive him again in their employ.

Appellee has been paid for all the services he actually rendered, and the present suit is only to recover damages for appellants' alleged breach of contract in not continuing him in their employ. The judgment below was in favor of appellee for $500.

The covenants of appellee clearly constitute but one single and entire undertaking; each goes to the whole consideration. The covenant of appellants to pay $3,000 per annum, although to be paid in monthly payments, was not for a part, but for the whole of the term. The covenant by appellee that he would devote himself entirely to the business of the firm, giving his whole time, attention and skill thereto, goes to the root of the whole matter; and when the situation of the parties, as disclosed by the evidence, is taken into consideration, it is manifest that the failure by appellee to perform his contract from the 12th to the 25th of January inclusive, would render the performance of the rest of the contract by appellee a thing different in substance from that which appellants stipulated for. Appellants were engaged in an extensive business in the manufacturing and selling of boys, youths and children's clothing. The month of

January was their busiest season of the year. In that month they manufactured their goods for the spring trade; and in the latter part of it they sent out their traveling men with samples. When appellee was arrested there were in appellants' employ fourteen cutters and three trimmers. It was his duty as superintendent and manager to superintend these, lay out their work, direct its performance, etc ; and also to inspect and receive work from the tailors, besides discharging various other duties incident to the position he assumed. It required peculiar skill, knowledge and great promptness and fidelity. To delay the manufacturing in that month would obviously work immediate pecuniary loss to some extent, and must necessarily materially endanger the future prospects of the business. Rival manufacturers would be enabled to forestall appellants in the trade of that year; and being once forestalled, they might not, during the term, recover their former trade. Besides, the character and quality of work have much to do in building up and establishing a prosperous permanent trade in manufactured articles, and great risk in that respect would be incurred by the mere change of superintendents and managers. Nor is it to be assumed that a person of competent experience, skill, energy and fidelity could be got without a moment's warning to fill such a position, and indeed to stay from day to day during such a season in the business, for a compensation approaching in any reasonable degree a *pro rata* part of that which he would be willing to accept for his services for a term of three years.

In our opinion, therefore, the failure of appellee to perform the services he had covenanted to perform, from the 12th to the 25th of January, 1875, was a substantial breach of his covenant.

Appellee has averred in his declaration, ability, readiness and offers to perform, and his undertaking being an entire one, it was incumbent on him to make the averment and support it by proof. Badgley v. Heald, 4 Gilm. 64; Swanzey v. Moore, 22 Ill. 63. Inasmuch, however, as appellants covenanted to pay for the services monthly, there could doubtless have been a recovery on the contract for services rendered for the month of December, 1874, after the expiration of that month, without any allegation further than that of performance of the contract by appellee during that time, but since that has been paid, and appellee seeks a recovery only for a breach of contract arising from his not being allowed to perform his part of the contract during the subsequent month, he is bound to aver and show readiness, ability and offers to perform the contract as to the subsequent time. This is held to be the rule in Cunningham v. Morrell, 10 Johns. 203, where Kent, C. J., carefully examines the authorities, and the court overrules its previous decisions in Sears v. Fowler, and Havens v. Bush, 2 Johns. 272, 387. This is approved in Tompkins v. Elliot, 5 Wend. 496; Bean v. Atwater, 4 Conn. 3, and McLure v. Rush, 9 Dana 64.

It may be conceded that appellee was put in jail without his fault, yet this would not relieve him of his covenant to give his whole time, attention and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He might have guarded against this by an exception in his covenant, but he did not do so. The rule is, it is a good defense to an action on a covenant in a contract that the obligation to perform the act required was dependent upon some other thing, which the other party was to do and has failed to do. And the defense is good, although the omission of the other party to do the thing required of him was produced by causes which he could neither foresee nor control. 2 Parsons on Contracts (6th ed.), 674; Chitty on Contracts (11 Amer. ed.) 1086.

There is a class of cases where a party contracting to render personal services after part performance becomes disabled by inevitable casualty, and is thereby prevented from fully completing his contract, has been held entitled to recover for the services actually rendered upon a *quantum meruit*. Fenton v. Clark, 11 Vt. 557; Hubbard v. Belden, 27 Vt. 645; Dickey v. Linscott, 20 Me. 453; Wolfe v. Howes, 20 N. Y. 197. But these furnish no warrant for the position that the laborer can, in such cases, recover upon the contract for a failure to pay for future services which he has been prevented from performing. On the contrary, they proceed upon the theory that the contract is discharged by the inevitable casualty, and therefore allow the party to recover simply for what he has earned. Another class of cases may be found where a party attempting to rescind a contract on account of the default of the opposite party is held precluded by his acceptances of the property, labor, etc., of the opposite party.

But such cases can have no application here. In those cases it is required that it shall be in the power of the party to abandon the material or product of labor received and rescind the contract in *toto*, without an abandonment of his own property. And his failure to thus abandon them is construed as an acceptance of performance. See Eldridge v. Rowe, 2 Gilm. 91.

Appellee's counsel cited Cuckson v. Staves, 1 Ellis & Ellis, 238 (102 Eng. Common Law, 248), and Selby v. Hutchinson, 4 Gilm. 332, in support of the position he assumes, that appellant's remedy for appellee's failure to keep and perform his covenants, was by an action for damages, and that he had no right to treat the contract as abandoned by appellee. The first case in our opinion is totally inapplicable to the facts here. There the plaintiff by an agreement in writing, agreed to serve the defendant as a brewer for the term of ten years for a stipulated compensation. He entered upon the performance of the contract, and some years afterwards fell ill, and was unable to attend to business from Christmas, 1857, until July, 1858. He returned to defendant's service when restored, and the defendant employed and paid him as before. Defendant's counsel conceded at the trial, that the contract was not abandoned, and the controversy was whether plaintiff should receive full wages during the time he was sick. What was said has

reference only to that state of case. Here appellee never was received into appellants' service after he was in jail. He has done nothing for appellants since that time, and appellants have refused to receive him again into their employ, because they allege his default justified them in treating the contract as abandoned.

In the other case, assumpsit was brought by Hutchinson as administrator of one Teed, for services rendered by Teed in his life-time in building a mill for Selby. The work was done under a special contract, and Teed died before the contract was fully performed on his part. His administrator offered to complete the contract, but Selby refused to allow this unless he would take out certain defective work and put other in its place. This the administrator refused to do. It was attempted to show upon the trial that Selby had not complied with his contract in not procuring certain material, and having certain work done as promptly as it was needed, and as required by the terms of the contract. On the other side, there was evidence showing that Selby's delay was through Teed's default in performing his part of the contract, and that the work to be done and materials furnished by Selby, were done and furnished by the time Teed needed them. Teed never undertook to declare the contract abandoned, but, on the contrary, proceeded with his work as if he regarded the contract as still subsisting. It was held that, even if there had been cause of forfeiture, Teed waived it, and that he, and not Selby, was in default. It will thus be seen the case varies materially, in the questions presented for consideration, from the present.

The general remark made by the court, in discussing the evidence which the counsel quote, that "in order to justify an abandonment of the contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default," is not understood as laying down the rule that, to justify an abandonment of a contract, the opposite party must have failed to discharge every obligation imposed on him, but simply that, matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for when the failure to perform the contract is in respect of matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised, the authorities all agree that the party not in default may abandon the contract. It is said, in Wood's Law of Master and Servant, p. 233, sec. 120, "Sickness, for a lengthened period — in one case two weeks—releases both parties from the contract. The master is not bound to wait unreasonably for the restoration of his servant's health, and *his necessities* may well be regarded as the measure of what is reasonable." See also, Hubbard v. Belden, *supra*. In Poussard v. Speirs, L. R., 1 Q. B. Div. 410, 3 Cent. L. J. 468, this rule is, in substance, recognized and applied by the court.

When neither party is at fault, the absence of the servant from the master or employer, without his consent, by whatever cause occasioned, for an unreasonable length of time, we are of opinion authorizes the master to treat the contract as abandoned; and what, in such case, is an unreasonable length of time, depends upon the nature and the necessities of the business in which the servant is employed.

Under the facts herein proved, a much shorter time than that during which appellee was confined in jail might, in our opinion, be regarded as unreasonable. Under different circumstances absence for a much greater length of time might furnish no cause for abandonment—the question always being, does the delay so affect the interests of the master, that the performance of the residue of the contract, by the servant, would be a thing different in substance from what the master contracted for.

There was evidence that after appellee was in jail, and whilst he was there, appellants agreed that if he got out and returned to his duties within a certain time, they would receive him into their employ. What that time was is controverted. Appellants claim that it was until the following Monday—appellee that it was two or three weeks. He was not out by the following Monday, but was out within two weeks, being released on the thirteenth day after his incarceration in jail. Although we think appellants' version, sustained as it is by appellee's admission that the season in appellants' business was such that they could not do without him—at the most for a greater length of time than two days—is more likely the correct one, we do not deem it of vital moment which is the truth. This promise did not amount to a contract. There was no mutuality in it, and no consideration to support it. It was a mere offer, which might be withdrawn at any time before it was acted on. It did not amount to an estoppel, because appellee did no act placing himself in a worse condition than he would otherwise have been in, on the faith of the promise. Had appellee been received again into appellants' employ, the promise and the act of receiving him would have been sufficient evidence of a waiver of a right to declare a forfeiture for the previous default. But not being received, and doing nothing on the faith of the promise to make his condition different or worse than it would have been had the promise not been made, it might be withdrawn at any time. It was a mere indication of a willingness to extend an indulgence on the part of appellee which, like any other offered favor, might be withdrawn at pleasure, when no substantial right had become vested on the faith of it. See Bigelow on Estoppel (1st ed.), p. 560, § 4. When appellants refused to receive appellee into their employ upon his return to their place of business, he was fully and sufficiently notified of their election to treat the contract as abandoned, and he needed no other or different notice.

Inasmuch as the rulings and judgment of the court below are not in harmony with the views

herein expressed, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTE.—The case here reported at first blush seems to be contrary in principle to the case of K—— v. Raschen, recently decided in the Exchequer Division of the English High Court of Justice, reported in 38 L. T. (N. S.) 38, and made the subject of a note in 6 Cent. L. J. 262. A careful consideration of the two cases however will reveal their distinguishing principle and show that they are thoroughly harmonious. In each case, the plaintiff was employed at a stated salary for a stipulated length of time. In each case, the plaintiff, served under the contract for a short time, and then was incapacitated from work, in the English case by reason of illness, and in the Illinois case by reason of imprisonment, which it was not in his power to prevent. In the English case, suit was brought by the plaintiff for wages due on the contract, from the beginning of the commencement of the service until his illness, and the court then very properly held that he could recover, as "*prima facie* illness is to be attributed to the act of God, and we are not justified in going back for any length of time and entering into an investigation as to what may have been the cause of it." The suit, in the case reported here, however, was brought by plaintiff not to recover back wages due, but for damages on the contract resulting from the defendants' refusal to take him back.

The principle enunciated in the English case is plainly recognized in the one here reported, although the former seems to have been overlooked in the decision of the court. L. S. M., JR.

IMPLIED WARRANTY— DISTINCTION BETWEEN LIABILITY OF DEALERS AND MANUFACTURERS.

WILSON v. DUNVILLE.

Irish High Court of Justice, Exchequer Division, February 17, 1879.

The defendant, a manufacturer of whisky, was in the habit of selling to the plaintiff refuse grains (produced in the course of the manufacture of whisky), as food for cattle, and the defendant knew that the grains were employed by the plaintiff for this purpose. A fire occurred on the premises of the defendant, which had the effect of causing the grains to become, without the knowledge of the defendant, mixed with a deleterious substance. The plaintiff purchased the grains so vitiated, and his cattle, in consequence of being fed therewith, died. *Held*, 1. That the sale to the plaintiff after the fire had occurred was upon the same terms as those previous to that occurrence. 2. That there was no implied warranty on the part of the defendant that the grains sold by him were fit for the purpose to which they were applied, inasmuch as the liability of the defendant was that of a dealer and not of a manufacturer, and that where a dealer contracts to supply a known and defined article, although it be stated by the buyer that such article is required for a particular purpose, if the known and defined thing be supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

Motion on behalf of the defendants, that a verdict entered for the plaintiff, in pursuance of the finding of the jury at the trial of the case at Belfast Summer Assizes, should be changed into a verdict for the defendants, inasmuch as the plaintiff had purchased the article sold by the defendants, grains for feeding cattle, at the plaintiff's own risk, and without any warranty on the part of the defendants that the grains were fit for the purpose to which they were applied. The circumstances are sufficiently explained in the judgment.

Porter, Q. C., *Monroe, Q. C.*, and *Weir*, for the defendants, cited Jones v. Bright, 5 Bing. 49; Mody v. Gregson, L. R. 4 Ex. 49; Brown v. Edgington, 2 C. B. 279; Laing v. Fidgeon, 4 Camp. 169.

W. Andrews, Q. C., and *Bruce*, for the plaintiff, cited Turner v. Mucklow, 8 Jur. N. S. 870; Nichols v. Godts, 10 Exch. 191; Jones v. Just, L. R. 3. Q. B. 197; Burnley v. Bollett, 16 M. & W. 644; Ward v. Hobbs, 2 Q. B. D 331, 6 Cent. L. J. 107; on appeal, 3 Q. B. D. 150, 8 Cent. L. J. 5, and Chitty on Contracts, ed. 1871, p. 420, 599.

Cur. adv. vult.

PALLES, C. B.

This action, so far as is material to the questions before us is for breach of an alleged warranty that certain grains sold by the defendants to the plaintiff were fit for cattle feeding. At the trial, before Mr. Justice Lawson, at Belfast, it appeared that the defendants, who were extensive distillers, were in the habit of selling "distillery grains," which consist of what remains of the corn used in the manufacture of whisky, after it has been subjected to the processes resorted to in the course of that manufacture. The sales of these grains were conducted under printed rules, which classified the customers. The first class was that of "special customers," and was composed of persons who guaranteed to take a given quantity of grains during each week of the season. It was the practice, when the demand for grains exceeded the supply, to give to persons of this class a preference in deliveries over ordinary customers. The special customers were entitled to receive every week special tickets for the quantity of grains which they had guaranteed to take. The delivery to each of these special customers was made according to his number in delivery lists, of which there were three for each delivery day, each list relating to a delivery commencing at a particular hour.

The plaintiff had been a special customer under these rules for several years. For the season of 1877-78 he was on the 10 o'clock delivery list of each Friday for twenty bushels per week. He was duly supplied with grains under this arrangement until the 10th of March. The course of delivery appeared to be that the servant sent by the plaintiff for the grains, went to the defendants' office, and there received and paid for the special ticket. This ticket he handed in at a ticket box, as soon as the plaintiff's name was reached in the calling of the delivery list. The grains, which there had been no previous opportunity of inspecting, were then delivered into the plaintiff's cart through a turnstile.

Upon the 13th of March a fire occurred at the defendants' distilleries. The plaintiff did not send for grains on the Friday next after the fire, because (as he stated) he heard that there were none ready

for delivery. But he did send on the following Friday, the 22d. On this occasion his servant did not get any ticket. When he applied for it at the usual place he was told he did not require it—that he was to go to the distillery, and get his load and pay for it. He accordingly went to the distillery, and waited there until his name was called, when he received and paid for his load. The quantity he received was thirty, not twenty bushels. He paid £1 for it, which, it was admitted during the argument, was at the same rate as the plaintiff had paid prior to the 13th of March. On cross-examination, the servant said that he saw the bulk lying in the distillery yard, which, contrary to usage, he was able to enter, in consequence of the turnstile having been burned down.

The plaintiff proved that he bought the grains for the purpose of feeding cattle, and there was evidence that the defendants knew of this purpose. It was also proved that the grains sold on the 22d, contained lead, which caused the death of several of the plaintiff's cattle.

The defendants' counsel, at the close of the plaintiff's case, and, again, at the close of their own evidence, called upon Mr. Justice Lawson to non-suit the plaintiff, or direct a verdict for the defendants. The grounds of this request are not stated in the report, and, as far as I can gather, were not mentioned at the trial. The learned judge declined to direct, but left the case to the jury. No objection was taken to the mode in which the case was so left, if it should have gone to the jury at all. The defendants' contention throughout was that they were entitled to have a verdict directed for them. The jury found for the plaintiff, and leave was reserved for the defendants to move to have the verdict entered for them, if the requisition of the defendants' counsel ought to have been complied with. Upon the argument before us, the defendants' counsel insisted upon two propositions. 1st. That the sale of 22d March was not upon the terms of the previous dealings, but was a sale of goods known to both parties to have been damaged by fire, and sold with all faults. 2d. That even if the sale were upon the terms of the previous dealings, there was no implication of the warranty relied on in the statement of claim.

In my opinion, the first contention of the defendants can not be maintained. I think it clear that it was for the jury to say whether the sale of 22d March was upon the terms of the previous sales. Those acting for the plaintiff were not informed that the grains delivered upon that occasion were to be received on terms different from those which governed the former deliveries. The old arrangement, *prima facie* at least, entitled the plaintiff to a delivery on the 22d. Under the third clause of the printed terms, the plaintiff was liable to forfeit his privilege as special customer if he declined to accept on this occasion. There was evidence that both parties acted, to a large extent, according to the practice which had been theretofore pursued as to special customers. The plaintiff's servant asked for a ticket, and his name was called when his turn came, according to his place on the special customers' list. The price paid was the price under the old arrangement, and this price was not the subject of agreement at the time. It was paid by one party and received by the other, as if the amount were a matter not open to discussion. It is true that the ticket was refused when asked for at the office, and that payment was made, not there, but in the yard; but these circumstances might not unreasonably be attributed to the turnstile having been burned down. It is also true that the former sales were sales of an article which the purchaser had not an opportunity of inspecting before delivery, and that the accident of the turnstile having been burned down, rendered it possible for the plaintiff's servant to have on this occasion examined the heap from which his load was to be taken. This opportunity of inspection would be of much importance if we had once arrived at the conclusion that there had, in fact, been a new contract as to the supply of the 22d March, and if the question were the effect in law of such opportunity of inspection on the implication of warranty, which might otherwise have arisen. But, on the question of there being, in fact, a new contract, the circumstance appears to me to be of little importance. The servant was sent to receive a load, to the delivery of which the plaintiff was *prima facie* entitled under the then existing arrangement. He was not authorized to ascertain the quality of the grains, or to receive or reject upon the result of his inspection In fact, he received the load without having exercised any judgment. The defendants also rely upon the quantity received having been thirty, instead of twenty, bushels, but this may have been attributed, by the jury, to there having been no delivery upon the immediately preceding Friday.

Upon the whole, I am clearly of opinion that there was evidence that the delivery of the 22d of March was made upon the old terms. This brings me to the second question: Is the warranty relied on—viz., that the grains were fit for feeding cattle, implied in such a contract for sale as that upon which the former delivery was made? It was a contract to supply a product which, although resulting from a manufacture carried on by the defendants for the purpose of producing another ar-article—viz., whisky—was an article in which the defendants dealt. It was an article of which, according to the usage, the purchaser had not an opportunity of inspection before delivery, and it was bought by the plaintiff, to the defendants' knowledge, for the purpose of feeding cattle. But, on the other hand, there does not, upon the evidence, appear to have been more than one description of grains produced in the manufacture. The entire so produced was treated as one bulk, and each customer was supplied out of so much of this bulk as remained at the time appointed for his attendance.

Those being the facts, I am of opinion that the warranty pleaded was not implied. In the first place, I think that the liability of the defendants here is as dealers, and not as manufacturers. In my opinion, the defendants are not manufacturers of grains, in the sense in which that word is used in reference to implied warranties of fitness. No doubt they reduce corn into the condition of grains, but they do so solely in the course of manu-

facture of another article—whisky. Their position as producers of those grains lacks the element upon which, in my mind, the liability of the manufacturer rests—viz., the power so to control the manufacturing process that a given result in the manufactured article can be arrived at. To attempt to alter or control the manufacture of whisky for the purpose of altering the character of the grains produced, would be inconsistent with the assumption which, on the evidence, I think, I am bound to make, that the sole object of the manufacture is to produce whisky. I do not say that there may not be cases in which the producers of a substance which it was not their primary object to manufacture, may not be manufacturers of that secondary product. All I say is that this is not one of those cases. Let us then take the liability of the defendants as dealers. The law upon the subject is settled by several cases, of which Jones v. Just, L. R. 3 Q. B. 197, is the most important, and may, in my opinion, be stated as follows: Where a dealer contracts to supply *a known and defined article*, then, although it be stated that such article is required for a particular purpose, if the known and defined thing be supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. But if the contract be not in relation to a known and defined thing, but to supply something in which the seller deals, and for the selection of which the buyer, according to the contract, necessarily trusts to the judgment or skill of the seller, then, if to the seller's knowledge that article is to be applied to a particular purpose, he impliedly warrants that it is reasonably fit for that purpose. In the first case, the purchaser, by his contract, defines the thing which he is to get, and reposes no trust in the seller, who can perform his contract only by selling the defined thing. In the second case, when the buyer necessarily trusts to the skill or judgment of the seller, the description in the contract of the thing to be supplied must be such as can be satisfied by articles of more than one kind; otherwise, it would be the case of a contract for a defined article, with which I have already dealt. Then the obligation, or, at least, the option to select, out of all the articles which will satisfy the description in the contract, the particular article to be supplied, must be in the seller. It is in this selection that the buyer trusts the judgment and skill of the seller, and the latter must, in such a case, select, as far as is reasonably possible, an article fit for the purposes to which it is to be applied.

It is hardly necessary to illustrate my meaning, but it can be easily done. If I order from a wine merchant a certain quantity of claret at a price named, for the purpose of sending it to a particular place abroad, which I also mention to him, any claret will answer the description in the contract, but in selecting out of all the clarets procurable at the price I name, the particular claret which he will supply to me, he must select one, if such there be, which will bear the voyage to that particular place. But if I order claret not by a general description, but claret of a particular vineyard, vintage, and brand, the contract can not be performed by the wine merchant unless he gives me that particular wine; and, although he knows that I intend to send it to a particular place abroad, he does not warrant that it is fit to be so sent. I undertake the risk that claret of that vineyard, vintage, and brand will bear the voyage when I order that defined thing for the purpose.

Now, let me apply these principles to the case before us. The grains are the product of one manufacture. There does not appear to be more than one species or kind of grains produced by the manufacture. Under the contract no trust is imposed on the defendants to exercise skill or judgment in the selection of the particular grains to be supplied to the plaintiff. They were under no obligation to make, nor indeed was there room for them to make, a selection for the plaintiff of any particular part of that with which the parties dealt as one uniform whole. They could not satisfy their contract otherwise than by giving him part of this known and defined thing. It follows, in my opinion, that a warranty of fitness was not implied. It may be said, in answer to what I have just stated, that the grains in fact supplied were not part of an uniform whole—that they were adulterated with a foreign substance, lead. That is so; and that admixture (an admixture which, there is evidence, rendered the substance useless and dangerous as grains) might be cogent evidence to prove that what was delivered did not reasonably answer the description of grains, and might thus prove a breach of a warranty different from that relied on. But what took place upon this exceptional occasion cannot affect the nature of the warranty arising from the course of dealing in reference to which the parties contracted.

I am, therefore, of opinion that upon the pleadings as they stand, the verdict ought to have been directed for the defendants. I am, however, by no means prepared to say that upon other pleadings the plaintiff might not have recovered upon the facts proved. It seems clear that a warranty was implied that the thing sold reasonably answered the description of distiller's grains, and there was, as I have already stated, evidence of a breach of that warranty. I, therefore, more than once suggested during the argument, that an application for an amendment of the statement of claim might have even then been entertained. No such application was, however, made. The verdict must, therefore, be entered for the defendants pursuant to leave reserved, and there must be judgment for them.

FITZGERALD and DOWSE, BB., concurred.

A complicated chicken case has taxed the legal acumen of a Georgia court. The party of the first part assumed to own the hen, and the party of the second part was charged with having stolen the same. The hen was introduced in evidence and duly identified, but while two ex-judges were arguing the case on its merits, she laid an egg in court. As soon as her cackle had advertised this new complication, the party of the first part claimed it as the product of his property; the party of the second part put in a counter bid; the judge on the bench was disposed to regard it as a judicial perquisite; and the janitor mumbled something about the nine points.

TELEGRAPHIC MESSAGES — POWER OF COURT TO ORDER PRODUCTION OF.

EX PARTE BROWN.

St. Louis Court of Appeals, April 28, 1879.

1. POWER OF COURT TO ORDER PRODUCTION OF TELEGRAPHIC MESSAGES—CONTEMPT.—Telegraphic messages are not exempt from the process of courts. B, the local manager of a telegraph office was by a subpœna *duces tecum*, issued by the criminal court at the instance of the grand jury, ordered to search for and produce certain telegrams therein named, but he refused to examine the files of the office, or to produce the telegrams. The inquiry was for the purpose of finding indictments against persons other than B. *Held*, that the criminal court did not exceed its jurisdiction in committing B for contempt in refusing to obey the subpœna.

2. CONSTRUCTION OF STATUTES AS TO DISCLOSING CONTENTS OF MESSAGES.—The statutes providing a punishment for the disclosure by any officer or servant of a telegraph company of the contents of a dispatch and giving damages for the disclosure, do not apply to a case where the dispatches are called for by legal process, in which case any disclosure made is the act of the law, and not of the company.

3. SUFFICIENCY OF DESCRIPTION IN SUBPŒNA.—A call, in a subpœna issued by a grand jury, for any and all messages passed between certain named parties during the last six months, is sufficiently certain without reference to the subject-matter. The obligation of secrecy imposed on the grand jury is a sufficient ground for not further indicating the subject-matter.

Habeas Corpus:

HAYDEN, J., delivered the opinion of the court:

The contention on the part of the petitioner is, that it affirmatively appears on the face of the papers that the criminal court, by which the petitioner was committed for contempt, exceeded its jurisdiction in committing for the supposed offense. The only contempt, it appears, was the petitioner's refusal to search for and produce certain telegraphic dispatches, alleged to be in the office of the Western Union Telegraph Company, in the city of St. Louis, of which company the petitioner is manager in that city, in obedience to a *subpœna duces tecum* issued by the criminal court at the instance of the grand jury for the city of St. Louis. This subpœna commands the petitioner to appear before the grand jury and there testify in a matter pending before them, and there to produce "any and all telegraphic dispatches or messages, or copies of the same, now in the office of the Western Union Telegraph Company, of which you are manager, and which dispatches and messages are now in your possession and under your control," etc. Here various persons are named as persons between whom dispatches passed, thus, "between Dr. J. C. Nidelet and A. B. Wakefield and Wm. Ladd and J. C. Nidelet," etc., and the subpœna, after thus naming the persons, continues "and any and all telegrams or copies or originals that may be in your possession, which may have been sent or received by or between any or all of the above-mentioned parties within the last six months," etc. In obedience to the writ, the petitioner appeared and testified before the grand jury, but, for reasons noticed below, declared, in answer to questions put, that he refused to examine the files of the company in the office of which he was manager for the dispatches or copies. It appeared that these inquiries were made with a view of finding indictments against persons other than the petitioner for offenses committed within the proper jurisdiction. The petitioner, being admonished in open court and still refusing, was committed as above stated.

On the part of the petitioner the attempt is made to put his case on the broadest grounds, and the general questions involved will, therefore, be considered at first without reference to authorities.

It is evident that there is no found ation for the position of the petitioner as to the exemption of these messages in any natural right, even if he is considered here as representing the senders and receivers of these telegrams, as well as his own company. Whatever may be said as to a man's thoughts, where, by communication on his part, those thoughts pass into the region of action, it becomes merely a matter of political regulation how far the State will go in compelling evidence of that action. The very provision—perhaps universal in the constitutions of our States—against unreasonable searches and seizures, and general and indefinite warrants, shows what primordial rights the individual has been willing to surrender to the State, even when the privacy of home has been invaded.

The people, in their fundamental law, expre sly provide that even this sanctity shall not remain inviolable against the hand of criminal justice. The provision of our constitution, however, (Constitution of Missouri, 1875, Bill of Rights, article 2, section 11), has little bearing upon the present question except by way of argument and illustration. The general warrants of England, and the writs of assistance of this country involved questions of a different nature from those relating to the social acts of the accused parties. Apart from the general nature of the warrants, which was the great evil and the decisive ground of illegality—a truth which is perpetuated in the language of the constitutional provision—the point was the indiscriminate seizure of all papers which the accused preserved in the privacy of his home, and the illegality of compelling by force the communication of the contents of those papers, thereby constraining the person, so far as the papers availed against him at all, to be his own accuser.

The difference is too obvious to be dwelt upon, where the communication is the act of the person himself. It is said, indeed, that the communication by telegraph is not voluntary, as it is made, not because the person desires it, but because he must, in order to so communicate, put the operator in possession of the facts. Cooley, Const. Lim., p. 307, note 1. But that the act of the person, in thus communicating is, in a legal sense, a voluntary act, is apparent.

The will of another does not, as it did in the case of Wilkes (Wilkes v. Wood, Lofft's Rep. 1), disclose the contents of the papers. There is precisely the same voluntariness in the act of a sender of a tel-

egram, however much he may dislike sending the message, that there is in the act of the principal, who, driven by necessity, utters in presence of his agent secrets, the disclosure of which may ruin the principal's business. In such case, the principal does not receive protection against disclosure by the agent, on the ground that the act of communicating was against the principal's will. Whether made in writing or orally, the act of communicating as such is the act of the person, and a man's acts are evidence against him.

The act of sending and that of receiving thus subjecting the persons to the ordinary consequence of having their acts used as evidence against them, why should there be an exception in case of communication by telegraph? It is not claimed that the relation of the parties or the subject-matter of the messages forms any ground of exception similar to that existing in case of husband and wife, or attorney and client.

The question is merely of the production of the dispatches, as such. If the parties to them, or their subject-matter, afford legal grounds of objection to the admission of their contents in evidence, under established rules, such objections can be made when the telegrams are produced.

Here the question is of the mere production, and the contention is that that production can not be compelled. To their production as telegrams there can be no objection on the ground of parties or subject-matter. A ground taken, however, in argument, is that the sender and receiver desire the messages to be kept secret. But even this is an assumption. Where, as here, we are bound to believe that it is necessary for the purposes of criminal justice that the best evidence should be produced—and the ability of courts of law to protect life and property must largely depend on the production of the best evidence—it ought rather to be assumed, as the telegraph company undertakes to retain custody of the originals long after the transmission, that there could be no objection to their production for lawful purposes. It is, in fact, so far as we can know, the company who resists production, not the parties to the dispatches.

But even if this assumption is allowable in such a case as the present, that sender and receiver object to the production, what does this objection amount to when tested by legal principle? Communications regarded by the parties as sacred, those from father to son, from brother to sister, from partner to partner—the closest secrets of the family or the firm—the law ruthlessly lays bare. On none of these grounds is the position tenable. The argument bases itself on the mere method of communication.

It is, then, in the physical means that we must find reasons for the conclusion that a new rule must be adopted, exempting telegrams in a company's hands from a well-settled course of practice as to the writ of subpœna *duces tecum*.

The argument at this point centers on an assumed analogy between communication by government post and by telegraph. It is difficult to discern either physical or legal basis for this argument. The sender by post does not select a method by which he communicates the contents of his package even to the officers of the government, much less to a mere private person or company. The sender by post does not necessarily send any message at all, but perhaps only inclosures. He transmits a package in bulk.

The sender of a sealed package, by the mere method chosen, preserves its contents as private until the receiver unseals it, as if the package has never left the sender's desk. and such is the legal effect. *Ex parte* Jackson, 96 U. S. 727. The physical analogue of the telegraph is rather the telephone, since both, in their essential parts, are methods, not by which packages, of contents unknown to the carrier are sent, but by which, through a substantial medium, persons at great distances from each other may converse.

It is true that writing becomes essential to telegraphy as a business, but the question now is as to the closeness of the physical analogy. The argument serves to show there is little foundation for comparison with the post, and to remind us that original telegrams are not "papers," otherwise than as any open messages might be so called, which, for convenience in communicating them to the messenger, had been written on pieces of paper. That the sender by telegraph is forced to communicate the contents to the operator is immaterial, since the sender chooses to telegraph. In a legal sense the act and its concomitants are voluntary.

The legal basis for comparison with the post is still less. Communication by post depends upon provisions of statutory law, and these statutes do not apply to the telegraph. It is said that no statute expressly forbids the production before the grand jury of letters from the government mails. But the post office laws are inconsistent with such production; nor could the mails be carried if, in every State the right of search were exercised. Again, it is not only under powers delegated by the people of the States to the Federal government that the latter has undertaken the control of the mails, but Congress has practically made the post a government monopoly. Even if it be held that the constitutional grant extends to telegraphs (Pensacola Tel. Co. v. Western, etc., Tel. Co., 96 U. S. 1), the power has not yet been exercised. The post office, in the sense of the mail service, is a department of the Federal government, and with the mails, as they are carried under acts of Congress, the States cannot directly or indirectly interfere. By what authority can it be assumed that a private person or company, engaged in the business of telegraphy, stands in relation to the State governments as does the Federal government when acting under express laws? But even the Federal government assumes no such privileges, as against the States and their legal process, as the private companies engaged in the business of telegraphy. What the post office department undertakes to do is merely to carry and deliver, not to retain, for its own purposes, and at its pleasure, "the best evidence" of a vast number of transactions. Letters are privileged only for the brief time they are in transit, and they become, when delivered, subject to the process of the courts. They have no inviolability

as "papers," but merely as mail communications in transit.

Again, for the government to allow seals to be broken open would be for it to violate trusts. It could not, without breaking faith with those whom it virtually compels to send their letters by mail, permit seals to be broken under its own or under State process. It is not merely that a law exists punishing an offender who breaks the seal of a letter in the mail. It is that the seal itself is a recognized type of inviolable secrecy, and that by a custom well established, both in this country and England, the powers of State refrain, even where special acts give an exceptional authority, from opening sealed packages intrusted to the government for carriage. But no such type of secrecy, and no such trust or custom exists in a case of the telegram. The sender, the receiver and the company know that, upon due process of law, the original message and copies—which the company has chosen to keep and to take the consequence of keeping—must be produced; for such is the law.

By our statutes it is provided that any person connected with any telegraph line constructed wholly or in part in this State, either as clerk, operator, etc., who shall willfully disclose the contents or the nature of any message or communication intrusted to him for transmission or delivery, *except to a court of justice*, to any person other than to whom it is addressed, or to his attorney or agent, etc., shall, upon conviction, be punished, etc. Wag. Stat. p. 507, sec. 51. By a clause in another section of the statutes, it is provided that every telegraph company, etc., shall be liable for a penalty, and special damages in addition, for the disclosure of the contents of any private dispatch to any person other than to him to whom it was addressed, or to his agents, etc. Wag. Stat., p. 325, sec. 13. If the provision first quoted did not exist, the last would raise no intendment in favor of the position of the petitioner. The object of this last provision is obvious. To stretch it beyond its express meaning, and assume a policy of law, is to beg the question. Besides, the construction of such acts is well settled. It is understood that there is always an exception in favor of legal process. Here the company, when called upon by the courts, discloses the contents of no dispatch. If the contents are disclosed—and it does not follow that they will be—the disclosure is the act of the law, not that of the company. As said by Lord Ellenborough in a parallel case, where the clerk of an official had, on entering upon his office, taken an oath not to disclose anything he should learn in that capacity, there is "an implied exception of the evidence to be given in a court of justice in obedience to a writ of subpœna. The witness must produce the book and answer all questions respecting the collection of the tax as if no such oath had been administered to him." Lee v. Birrell, 3 Camp. 387.

After what has been said it is unnecessary to dwell upon the consequences which would follow if the production of telegrams—great as this mass of evidence is, and relating to transactions infinite in number—were not left to that uniformity which can be secured only by a fixed rule of law. Since the evidence may be competent (if it can only be obtained), and, if competent, the court would have no power to exclude it, the guilt or innocence of a person is made on the theory urged, to depend not upon the operation of a rule of law which is uniform in every case, but upon private interest or caprice. Certainly, if telegrams are to be produced in any case of a criminal nature, there should be the power of compelling their production in all cases. Evidence of this kind should be uniformly admitted when competent, or uniformly excluded. Nor is it necessary to do more than to advert to the fact that if the great avenues through which the business of the community passes, and in which evidence remains, are to be closed to the powers of the courts; if, as new methods of communication spring up, the courts are to be debarred from these sources of truth, they are, so far forth, liable to fail in the chief purpose which they are created to accomplish. Undoubtedly great inconveniences may arise to telegraph companies through subpœnas *duces tecum;* but that they have original evidence of transactions in their possession is the necessary result of the business as they carry it on; and they, like others, must submit to those annoyances which are consequent upon the execution of the laws.

Thus we have reached the conclusion that, upon principle and apart from authority, the position of the petitioner is not tenable, while, so far as adjudged cases are produced, they are uniformly to the effect that there is no peculiarity in telegraphic messages, as such, which exempts them or their contents from the process of the courts. Commonwealth v. Jeffries, 7 Allen, 548; National Bank v. National Bank, 7 West Va. 544; State v. Litchfield, 58 Me. 267; Heinsler v. Freedman, 2 Pars. Sel. Eq. Cas. 274; Inces's Case, 20 L. T., N. S. 421. That telegraphic communications should be regarded as privileged, is maintained by Judge Cooley. Const. Lim. 307, note 1; Am. Law Reg. for February, 1879, 65. In United States v. Babcock, 3 Dill. 567, 3 Cent. L. J. 101, the question above discussed was not raised.

What has been said serves to show that it is no excuse for the petitioner that to comply with the writ would require him to neglect his duties to the company, or that he has been instructed, by his superior officers, and by his employer, the company, not to produce the telegrams. Nor can he urge that he has no control over these dispatches because his duty is merely to keep them, as directed by the company. He is, as he testifies, the manager of the St. Louis office, and, as such, has the custody and control of the dispatches or copies called for, if there are any such telegrams in his office, and for these he has refused to search. The present is not the case of a clerk, or subordinate, summoned to produce papers not under his control. President v. Hillard, 5 Cow. 153; Hustin v. Evans, 2 M. & G. 446. The company is here a corporation which can act only through agents, and service need not necessarily be upon the president, but may be upon the person who has the actual control and means of effectually responding

to the writ. Amey v. Long, 1 Camp. 14; s. c. 9 East. 473; 1 Arch. Q. B. Pr. 170. Undoubtedly, in civil cases, where the opertion of the writ of subpœna *duces tecum* would be harsh, the power will be exercised in the sound discretion of the court. Crowther v. Appleby L. R., 9 C. P. 23; see Atty.-Genl. v. Wilson, 9 Sim. 526; Lee v. Angus, L. R. 2 Eq. 59.

It is further urged that there is no sufficient or certain description of the papers required, and that the call is for "any and all" messages which may have passed between the parties named during the last six months, without reference to facts or subject-matter. But the obligation of secrecy imposed by law upon the grand jury, is a sufficient answer to the objection that the subject matter of the dispatches is not indicated. Wag. Stat., p. 1083, secs. 16, 17. By agreement, the subpœna is considered to describe each day, as if each day were named, and it is imposible for us to say on what days dispatches have passed, or that there have not passed dispatches on each day thus described. As the jurisdiction of the criminal court was not exceeded in committing the petitioner for the contempt charged, the petitioner must be remanded and remain in the custody of the marshal.

Bakewell, J., concurs; Lewis, P. J., dissents.

STATUTE OF FRAUDS — REQUISITES OF MEMORANDUM UNDER.

GRAFTON v. CUMMINGS.

Supreme Court of the United States, October Term, 1878.

The memorandum in writing necessary to make a valid contract, within the meaning of the statute of frauds, though signed by the defendant and describing with sufficient distinctness the property sold, and the consideration to be paid, is not sufficient to sustain an action, unless the other party to the agreement is either named in the memorandum or so designated in some paper signed by the defendant that he could be identified without parol proof.

In error to the Circuit Court of the United States for the Southern District of New York.

MR. JUSTICE MILLER delivered the opinion of the court.

On the 16th day of May, 1871, the hotel known as the Glen House, at the foot of the White Mountains in New Hampshire, together with its furniture, was bid off at an auction sale by Grafton, the plaintiff in error, at the price of $90,000. At the end of the ten days allowed by the terms of the sale for examination of the title, three deeds were tendered him which were supposed to convey the title. He refused to accept the deeds, or to pay the purchase money, or otherwise complete the contract of purchase. The property was again advertised for sale and sold for $61,000, and the present suit was brought to recover the difference in the amounts for which the property sold at these two sales, as damages for failure to perform the first contract. The suit was brought in the Circuit Court for the Southern District of New York, and a verdict and judgment recovered against Grafton, to which he prosecutes this writ of error.

The bill of exceptions is voluminous, containing apparently everything said and done on the trial. Sixty-one errors are assigned in this court.

We shall confine ourselves to the examination of one of them. That one presents the question, as it occurs in various forms in the record, whether there was a sufficient memorandum of the contract in writing, under the statute of frauds of New Hampshire, to sustain the action. That statute is in these words: "No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto authorized by writing." The agreement given in evidence on the trial by Cummings, the sole plaintiff, consisted of a paper in writing signed by Grafton, certain printed matter on the margin of that writing, and the advertisement mentioned in the writing so signed. They are as follows:

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction Tuesday, May 16, 1871, at 11 o'clock A. M., and for the sum of ninety thousand dollars, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"Joseph Grafton."

Upon the margin of said agreement were written and printed the following:

"Terms of sale. Ten days will be allowed to examine the title, within which time the property must be settled for. $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase money to be paid September 1, 1871, the remaining balance to be paid September 1, 1872.

"The property is sold subject to the conditions of the sale of the stage route, stages, etc., which are that the proprietors of the route shall have the exclusive business of the house."

The advertisement referred to in the foregoing paper as being thereunto affixed, was as follows:

"Glen House at Auction. The famous summer resort, at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill, and out-buildings, will be sold at public auction at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock, A. M. May 2d, 1871."

"Valuable Hotel Property for Sale.—The favorite summer resort known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the

land, containing about one thousand acres (well timbered), all the out-buildings, stables, and mill on the same, also the furniture, staging, mountain carriages, horses, &c. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property if not disposed of at private sale previous to the first of May, will be sold at public auction to close the estate of the late J. M. Thompson. Notice of the time and place of sale will be given hereafter. Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine."

The bill of exceptions adds, that when this paper was put in evidence it was indorsed "A. R. Walker, auctioneer and agent for both parties." It is not satisfactorily shown when this indorsement was made, and there is some evidence to show that it was not there at the time the deeds were tendered and Grafton refused to accept them. The court, however, instructed the jury that if it was done at any time before the commencement of this action it was sufficient.

Evidence was admitted to show that at the time of the sale another paper was read by the auctioneer affecting the terms of the sale, but as this was not among the papers subscribed by defendant, we will first consider whether these were sufficient to sustain the action.

It is proper to observe that the objection to these papers is not that they were *not signed by Grafton, the party charged,* for he signed himself the principal instrument, and the reference to the others and their annexation to that, are sufficient to make them a part of the paper which he did sign. We shall, also, for the purpose of this inquiry, take it that Walker was the auctioneer, and that his name indorsed on the instrument gives it all the value which it could have if signed at any time necessary for that purpose.

The distinct objection to the instrument, as so presented, is that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony.

The statute not only requires that the agreement on which it is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the *agreement or memorandum shall be in writing.* In an agreement of sale there can be no contract without both a vendor and vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and to deliver the consideration for the price so paid.

There can be no bargain without two parties. There can be no valid *agreement in writing* without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on *his* part would bind the party who did sign. But Grafton did not agree to buy this property of *anybody* who might be found able and willing to furnish him a title. He was making a contract which required a vendor and vendee at the time it was made, and he is liable only to *that* vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.

It is alleged that Stephen H. Cummings, the plaintiff in this action, was the vendor, and that this sufficiently appears in the papers of which we have given copies.

The first ground on which it is sought to maintain this proposition is that Walker's indorsement is sufficient for that purpose.

It is very clear that Walker did not intend to hold himself out as the vendor in this case, because he describes himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he was sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. He could not in the act of signing that paper be the agent of Grafton, for Grafton signed it for himself. The statement therefore did not mean that he *signed* for both parties, because he did not, and could not sign as agent for Grafton.

What did he mean by putting his name there? It can have no *other fair* meaning than simply to say, as he does, "I was the auctioneer who struck off this property."

But concede that he meant to represent the other party in that contract, a contract in which he takes care not to bind himself, who is that other party? What light does the writing of his name as auctioneer and agent throw on that question? Literally none. An anxious reader of the whole paper and its attachments would know as little who sold, or for whom Mr. Walker was selling, after his signature as he did before. To say "agent for both parties" may show he was agent for the one party whose name is not there, but it does not show who was that party. The paper without Walker's indorsement shows who was the purchaser, but neither with nor without it does it show who was the seller.

It is next argued that the reference to Cummings' name in the advertisement annexed to the paper signed by defendant, is sufficient for this. The

statement is that the sale is made to close out the estate of the late Mr. Thompson; and "any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine." Three persons are here mentioned. One, Mr. Thompson, was dead and could not be the vendor. Another, Mr. Weeks, though not mentioned as a party selling, it may be inferred had some interest in the sale as administrator of Thompson. But Weeks does not sue, and if his name had been inserted in the contract as vendor, it would not have sustained the present action. But the true intent of that advertisement was not to describe the vendors, or even the owners of the land, but to designate persons who might give any information about the property, which one thinking of purchasing would need. This did not require that the person referred to should be the owner of the land or the party selling it. Such inquiries could as well be answered by a lawyer, a real estate agent, the latest keeper of the hotel, or one who had been his clerk, as by the owner. There did not arise, therefore, any implication from the reference to Mr. Cummings that he was owner, or even part owner, or that he was holding himself out as the party selling.

The next effort to sustain the instrument sued on as valid may be said to be a vague effort to show, by the verbal history of the transaction, that defendant recognized Cummings as vendor by subsequent interviews and negotiations with him on the subject of the sale. And special importance in this part of the case is attached to a letter written by Davis, a lawyer, to Cummings.

The letter is liable to three objections, as a recognition by defendant of Cummings as the party of whom he had purchased:

1. No such recognition is to be found in the letter. It consists of suggestions on the part of Davis of what had better be done with the property; that Cummings, Mrs. Thompson and Grafton ought to take it, and that Grafton really don't wish to have anything to do with it. It is not even a recognition of the validity of the purchase, and nowhere speaks of Cummings as the vendor, but he might rather be supposed to be a purchaser with Grafton.

2. Davis does not profess to be speaking or acting for Grafton. He writes in his own name. It is shown by other evidence that, either as attorney, or for himself, he controlled the larger part of the debts against Thompson's estate, which made the sale necessary, and it may be fairly inferred that it was in this character he spoke.

3. There is no satisfactory evidence that he was authorized to act for Grafton in that transaction, and none whatever that he was authorized by him to write that letter. The New Hampshire statute requires that the authority of an agent to charge a party shall be in writing, and there is no pretense that Davis had any such authority from Grafton.

These views of the proper construction of the statute are amply sustained by authority.

In the leading case of Wain v. Walters, 5 East's 10, decided by Lord Ellenborough under the English statute, the same as that of New Hampshire on the point in question, that eminent judge said: "The question is whether that word (agreement) is to be understood in a loose, incorrect sense in which it may be sometimes used as synonymous to promise or understanding, or in its more correct sense as signifying a mutual contract on consideration between two or more parties." He held the latter to be the true construction, and that all its essential elements must appear in the memorandum, including the consideration, which in that case was absent. This has been held to be the law in England ever since.

In the case of Williams v. Byrnes, before the privy council, reported in 9 Jur. N.S. 363, decided in 1863, the defendant had, in a letter to one Hardy, told him that he would furnish the funds to pay for a steam engine if the latter would find and purchase a suitable one. Hardy made a verbal contract for the engine, and the vendor sued defendant on this memorandum. Coleridge, J., in delivering the judgment of the privy council, said: "The language of the statute cannot be satisfied unless the existence of a bargain or contract appear in evidence in writing, and a bargain cannot so appear unless the parties to it are specified, either nominally or by description or reference," and the ruling of the chief justice that this could be done by extrinsic proof as to who was the vendor was reversed. It is precisely in point with the one before us.

The case of Sale v. Lambert, L. R., 18 Eq. 1, was a sale of real estate in which the party charged was the vendor. The memorandum was signed by Sale, the purchaser, for himself, and by George Jackson, the auctioneer, *for the vendor*. This memorandum was indorsed on a bill of particulars of the conditions of the sale, in which it was said that the property was sold by the proprietor. The court held that the word proprietor sufficiently described the vendor and ascertained who was the party for whom the auctioneer signed. But in the very next case in the volume, Potter v. Duffield, the same court, by the mouth of the same judge, held that the words "confirmed on the part of the vendor, and signed Beadels," did not sufficiently designate who the vendor was, and that a suit against the owner could not be sustained on the memorandum. The master of the rolls said: "If you could go into evidence as to the person who is described as vendor, the answer would be that Polly was that person. But that is exactly what the act says shall not be decided by parol evidence." In the case before us, Mr. Walker, the auctioneer, does not even say that he signed for the vendor, as Beadels did in the case cited.

But the case which should have most weight in forming our judgment is that of Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47, because it is an authoritative construction of the statute of the State where this contract was made and where the land is situated to which the contract relates, made by the highest court of that State sixty years ago and never overruled. The case is so perfectly parallel to the one under consideration, that its circumstances need not be repeated. It is sufficient to say that the want of the vendor's name in the

memorandum was held fatal to any right of action, though the auctioneer's name was signed to a memorandum otherwise sufficient. The concluding language of the court is, that "the written evidence which hath been offered to prove the contract declared on, as it fails to give any intimation that plaintiffs were one of the parties to that contract, must itself be considered fatally defective and inadmissible."

The same doctrine is laid down in the excellent work of Mr. Browne on the Statute of Frauds, § 372 to 375, and the authorities fully cited. He also speaks of the case of Salmon Falls Manufacturing Co. v. Goddard, decided by this court, and reported 14 How. 446, as one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. In that case, Mr. Justice Curtis, Mr. Justice Catron, and Mr. Justice Daniels dissented in an able opinion by the judge first named. It may be doubted whether the opinion of the majority, in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers, is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire, concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that State on the subject.

Defendant in error relies mainly on that case and the later one of Beckwith v. Talbot, 95 U. S. 289, 6 Cent. L. J. 214. The latter case, however, affords no support to the argument of counsel. The defendant in that action was charged, it is true, on a memorandum in which his name was not found. But he produced that memorandum from his own possession on the trial, and letters of his written to plaintiff while the agreement was so in his possession were given in evidence, which referred to the agreement and acknowleged its obligatory force on himself, in terms that required no parol proof to identify it as the agreement to which he referred. This was within all the cases a sufficient signing of the memorandum, though found in another paper, written by the party to be charged, to comply with the statute of frauds, and so this court held.

We are of opinion that there was no sufficient memorandum in writing of the agreement on which this suit was brought to sustain the verdict of the jury.

The judgment of the circuit court is, therefore, reversed and the case remanded to that court, with instructions to set aside the verdict.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

ACCOMPLICES—AGREEMENT BY GOVERNMENT NOT TO PROSECUTE NOT BINDING.—One who is *particeps criminis* in the commission of an offense acquires no more than an equitable title to the clemency of the Executive by testifying against his co-conspirators, and an agreement made by the district attorney not to prosecute him for the offense can not be pleaded in bar, being void for want of authority.—*United States v. Ford.* In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice CLIFFORD. Judgment reversed.

PATENTS—JURISDICTION OF FEDERAL COURTS.—1. A suit between citizens of the same State can not be sustained in a circuit court of the United States as arising under the patent laws, where there is no denial of the validity of the plaintiff's patent, where its use is admitted, and where a subsisting contract is shown governing the rights of the parties in the use of the invention. 2. Relief in such an action is founded on the contract and not on the patent laws of the United States.—*Hartell v. Tilghman.* Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. Opinion by Mr. Justice MILLER. Decree reversed.

CORPORATION—COMPELLING TRANSFER OF SHARES OF STOCK—PARTIES.—K filed a bill against D claiming 184 shares of stock in the Memphis Gas-light Company, and charging that while in possession of the books and control of the office of the company, he caused a transfer to be made on the books of the company to him of the shares of its stock owned by plaintiff, and the relief asked was the restoration of the stock on the books of the company to the name of plaintiff, and the future recognition by the company of his rights in the stock. The bill prayed that D should be compelled to do this. *Held*, that in the absence of the Gas-light Company as a party to the proceeding, no such relief could be decreed. "This suit is not brought to recover the dividends received by Dean which ought rightfully to have been paid to plaintiff. No such relief is asked, and no averment that any dividends were declared or paid to Dean on that account. Nor is it brought to recover damages for the wrongful seizure of plaintiff's property and conversion of it to defendant's use. The relief appropriate to either of these grievances might have been sought in an action at law. It is not an action to obtain from Dean the specific certificate of stock, for that remains in plaintiff's possession. * * * Suppose that the court had rendered a decree in the exact language asked by plaintiff, and Dean should be attached for contempt in refusing to perform it. He could answer very truly that he was not the gas-light company, and had no control of the books or of the officers of the company. That he had no means of compelling the company to make transfer of this or any other stock on its books. That it was a corporation governed by its own officers, and was not bound by the decree of the court, and would not perform it. The court would find itself in the position of having made a decree it could not enforce, of attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit. On the other hand, if the gas-light company had been a party to the suit and plaintiff had sustained the allegation of his bill by proof, the relief would have been perfect. The company could have been compelled to restore plaintiff to the ownership of the stock on their books, and to treat him in future as one of their stockholders, and the decree would have bound both Dean and the company. As it is, the specific relief sought by plaintiff is not within the power of the court, nor is there any relief within the equity jurisdiction of the court which can arise out of the frame of the bill in the absence of the gas-light company."—*Kendig v. Dean.* Appeal from the Circuit Court of the United States for the Western District of Tennessee. Opinion by Mr. Justice MILLER. Decree reversed.

SOME RECENT FOREIGN DECISIONS.

NEGLIGENCE — OVERFLOWING OF DOCK BANK—STATUTORY OBLIGATION-DUTY OF RIPARIAN OWNER TO MAINTAIN RIVER-WALL—COMMON LAW LIABILITY—ACT OF GOD—APPORTIONMENT OF DAMAGE. —*Nitro Phosphate, etc., Co. v. London, etc. Docks.* English Court of Appeal, 27 W. R. 267. The owners of a dock on the Thames, originally made under one act of Parliament, enlarged under another, and transferred under a third act amalgamating two companies, were, on the construction of the various acts adopted by the court, held to be under a statutory obligation to keep their dock bank to a height of four feet above Trinity high-water mark. Their bank was less than that height. The commissioners for the district in which the dock was situate required the river frontagers to maintain a river-wall at a height of four feet two inches above Trinity high-water mark, and before the dock was made, the river-wall had, at the place where the entrance to it was cut, been at the required height. An extraordinary high tide, rising 4 feet 6 inches above Trinity high-water mark, having overflowed the defendants' dock-bank, eventually flooded and damaged the plaintiff's property. *Held*, by FRY, J., that the whole damage was due to the defendant's neglect; that the defendants were liable for the damage by reason of the breach of their statutory liability; but that if the case had rested on their common law liability they would not have been liable, as the flood was the act of God. *Held*, by the Court of Appeal, that the defendants were liable for the breach of their statutory obligation; secondly, that even if they had not been under such an obligation, they would still have been liable as riparian owners for not maintaining the river-wall to the proper height; and, thirdly, that they were liable under a common law liability for not having taken proper and sufficient precautions to prevent the damage: but that the declaration of Fry, J., that the whole damage was due to the defendants' neglect must be omitted, so that deduction might be made if the defendants could show that any part of the damage was due to the overflow occurring after the tide had reached the height at which the defendants' bank ought to have been. Decision of Fry, J., affirmed, with a variation, with costs.

LANDLORD AND TENANT — "OUTWARD MARK OR SHOW OF BUSINESS" — BREACH OF COVENANT — RIGHT OF RE-ENTRY ON BREACH OF NEGATIVE COVENANT—WAIVER BY PLEADINGS — LESSEE RESPONSIBLE FOR SUB-LESSEE'S ACTS—INJUNCTION. —*Evans v. Davis.* English High Court, Chancery Division. 27 W. R. 285. 1. The plaintiff, having agreed for a lease of premises for a term of years, agreed to lease a part of such premises to the defendant D, such lease to D to contain the same covenants as should be contained in the plaintiff's own lease, when granted. The plaintiff's lease, when granted, contained a covenant "not to affix or permit any outward mark or show of business to be affixed to the premises." The defendant D sub-leased to the defendant B, and the latter, with D's license, so far as he was able to give the same, carried on a tailor's business on the premises, and erected a brass plate on the outside railing of the premises, and also put up blinds, inside the windows, having her trade name thereon. *Held*, that a breach of the covenant had been committed, and that an injunction must be granted against the defendant D, as well as against the defendant B, to restrain the continuance of the breach. 2. It being proposed to ask a witness questions tending to show that similar covenants were not enforced by the same freeholders in other particular cases: *Held*, that only evidence of the interpretation placed upon the language employed in the covenants by the custom of the neighborhood generally could be admitted. 3. The sub-lease from D to B having been made without the plaintiff's consent, notwithstanding that the agreement between the plaintiff and D provided for a covenant to the contrary to be contained in D's lease, when granted: *Held*, that the plaintiff was *prima facie* entitled to recover possession of the premises. But the plaintiff having offered by his statement of claim to grant D the lease for which he had agreed with him: *Held*, that he had thereby waived his claim to recover possession.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January-March, 1879.

CONDITIONAL SALE — REPLEVIN — DEMAND. — Where goods are sold with the condition that they should be sent to the defendant for examination, and if satisfactory the defendant was to give a four months' note in payment, and after the goods are sent the defendant fails for three days to give notice of his acceptance of the goods, or give the note, though requested to do so, the plaintiff may take possession by replevin without making a demand for the return of the goods. Hill v. Freeman, 3 Cush. 257; Farlow v. Ellis, 15 Gray, 329: Hirschorn v. Canney, 98 Mass. 149. Opinion by GRAY, C. J.—*Salomon v. Hathaway.*

CRIMINAL LAW — CONFESSIONS — EVIDENCE. — Where, in the trial of a criminal case, the government offered in evidence the confessions of the defendant to the deputy sheriff who had arrested him, which were objected to on the ground that they were made in consequence of offers of favor by the officer, and the officer was allowed to be called and denied having made offers of favor, whereupon the defendant offered to call several witnesses to prove the truth of his claim, but the court declined to admit their testimony: *Held*, that it was error so to admit the confessions. *Prima facie* they were competent; but the defendant claimed them to be incompetent on account of certain extrinsic facts. It was for the defendant to establish those facts, and it was the duty of the presiding judge to ascertain whether they existed before admitting the confessions. Opinion by LORD, J.—*Com. v. Culver.*

RAILROAD— LIABILITY TO TRESPASSER. — Where, in an action against a railroad corporation to recover damages for personal injuries, it appeared that the plaintiff, then a child four years and seven months old, was a mere intruder and trespasser upon the track; that no inducement or implied invitation to him to enter upon it had been held out; that he was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using the track as a play-ground, it was *held*, that the defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him. Johnson v. Boston & Maine R. Co., 124 Mass. 75. Opinion by AMES, J.—*Morrissey v. Eastern R. Co.*

MARRIED WOMAN—STATUTE— "SEPARATE BUSINESS."—Under the statute of 1862, ch. 198, § 1, which requires that a married woman, doing business on her separate account, in order to protect her property employed in such business from liability to be attached or her husband's debts, must file with the town clerk

the certificate prescribed by that statute, if a married woman carries on a farm for the support of her family, or her husband's family, she is following a separate business which requires the designated certificate for the protection of the personal property employed in it from liability to the husband's debts. Chapman v. Foster, 6 Allen, 138; Ferau v. Rudelphsen, 106 Mass. 491. Opinion by AMES, J.—*Snow v. Sheldon.*

SUPREME COURT OF INDIANA.

November Term, 1878.

EVIDENCE—DEPOSITIONS —WEIGHT OF.— On the trial of this case, the court gave the following instructions to the jury: "In weighing the evidence of witnesses you are to look on their means of knowledge, and at their honesty in the light of all the corroborating and surrounding facts and circumstances in the case; and in this connection you have a right to look at the appearance of the witnessses upon the stand, and because of this, other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions." This instruction can not be sustained. In many cases the testimony of a witness orally given is much more likely to make a decided impression upon the jury than if communicated in the form of a deposition. In other cases, the deposition of witnesses would be more likely to make a favorable impression on the jury then if such witnesses had testified orally before the jury, depending in every case upon the intelligence, the peculiarities, the general appearance and all other circumstances attending each particular witness. These are matters about which the laws lays down no general or inexorable rule. They constitute facts for the consideration of the jury in every case in which such questions may arise. The case of Coner v. Louthain, 38 Ind. 530, is overruled, so far as inconsistent with this opinion. Reversed. Opinion by NIBLACK, J.—*Milner v. Eglin.*

EVIDENCE—BURDEN OF PROOF—RIGHTS OF COURT AND JURY. — This was an action by The Witness Printing Company against Moss and others upon a contract to furnish 500 subscribers to the paper published by said company or pay $750, in consideration of the paper being conducted in the interest of the Greenback party. There was a trial by jury and a verdict for the plaintiff. It is insisted that the verdict was not sustained by sufficient evidence, because no evidence was offered to show that the paper had been conducted in accordance with the interest of the Greenback party. *Held*, that if the plaintiff's newspaper was not in fact conducted in the manner contracted for, this would have been a failure of consideration, partial or complete, and was strictly matter of defense to be shown by the defendants. It was the province and duty of the court to construe the written contract and instruct the jury as to its legal effect. Under the evidence, the court could not well have done otherwise than instruct the jury to return a verdict for the plaintiff. This was not usurping the province of the jury, but was simply a discharge of duty by the court. Affirmed. Opinion by HOWK, C. J.—*Moss v. Witness Printing Co.*

FOREIGN INSURANCE COMPANIES — STATUTORY CONSTRUCTION.—The fact that neither a foreign corporation nor its agent has complied with the provisions of the act of June 17, 1852, by filing in the clerk's office of the county where business is to be transacted, a power of attorney or other certificate of authority to do business therein, as required by said act, does not render a note or mortgage taken by the agent of such corporation in such county void. But if suit is brought on such note, such fact may be pleaded in abatement of the action. Congress has the power to provide for the incorporation of a private corporation within the District of Columbia only, and a corporation so created is a "foreign corporation," within the meaning of the above act. One act may be repealed by another by implication when the latter act is clearly in conflict with the provisions of the older statute. In such case, the latter act repeals the older one, so far as the conflict between the two statutes extends. The act of 1865, so far as it relates to insurance companies "incorporated by any other State than Indiana," and to insurance companies "incorporated by any government foreign to the United States," repeals the act of 1852, so far as the said act relates to such classes of companies, but no farther. It does not apply to corporations created by Congress, within and for the District of Columbia; such corporations are still governed by the act of 1852. BIDDLE, J., disssented from so much of the opinion as holds that a corporation created by act of Congress, within and for the District of Columbia, is a foreign corporation, within the meaning of the statute, and held that the act of 1865 repealed that of 1852, in relation to all insurance companies. Opinion by HOWK, C. J.—*Daly v. National Life Ins. Co.*

POWER OF LEGISLATURE TO LEGALIZE VOID ACTS —SUIT PENDING IN COURT.—Action by appellant to enjoin the collection of certain taxes assessed against its property by appellee. The proceedings which led to the levy and assessment of the taxes did not conform strictly to the requirements of the statute as was necessary to make them legal, and the taxes assessed were illegal and void. This action was commenced in the circuit court on November 7, 1876, but the amended complaint was not filed until February 6, 1877. On the 3d day of February. 1877, the legislature passed an act to legalize the action of the board of commissioners, complained of by appellant. What effect should such curative act have upon the proper decision of this case? HOWK, C. J., said: "The legislature, in the passage of the statute above cited, invaded and exercised the functions of the judicial department of our State government, and for this reason the act must be held unconstitutional and void. The general assembly made a special finding in and by the preamble to the act, of matters of fact, and upon such finding, adjudged and declared that the acts of the appellee were thereby legalized. It was not within the power of the general assembly to thus legalize the illegal and void proceedings of the commissioners of Grant county. The record shows that on the 29th day of November, 1876, the court below overruled the appellee's demurrer to the complaint. After the passage of the curative statute the court sustained the demurrer. Here was the 'arbitrary will of the legislature,' controlling the action of the court before which the suit was pending. It was not within the power of the legislature, by a special act directed to a particular case then pending before the courts, to change the decision of that case. Special legislation on such subject is prohibited by sections 22 and 23 of of the fourth article of the constitution. 19 Ill. 226; 2 Allen, 361; 16 Penn. St. 256, 258; Cooley's Const. Lim. 3d ed. 106. Reversed."— *Columbus, etc. R. Co. v. Commrs, Grant Co.*

COURT OF APPEALS OF MARYLAND.

[From advance sheets of 48 Md.]

ATTORNEYS — POWER OF STATE TO REGULATE ADMISSION OF, NOT AFFECTED BY FOURTEENTH AMENDMENT.—1. Under sec. 3, of the act of 1876, ch. 264, the privilege of admission as an attorney in the

courts of this State is limited to white male citizens above the age of twenty-one years. 2. The limitation to the privilege of admission as an attorney in the courts of this State, as provided by sec. 3, of the act of 1867, ch. 264, is not repugnant to the fourteenth amendment of the Constitution of the United States. 3. The privilege of admission to the office of an attorney is not a right or immunity belonging to the citizen, within the meaning of the fourteenth amendment of the Constitution of the United States, but is governed and regulated by the legislature, who may prescribe the qualifications required and designate the class of persons who may be admitted. 4. The power of regulating the admissions of attorneys in the courts of a State, is one belonging to the State and not to the Federal government. Opinion by BARTOL, C. J.—*In re Taylor.*

WHEN OFFER BY PARTY TO PENDING CONTROVERSY NOT EVIDENCE AGAINST HIM—ADMISSIONS BY A PARTY TO PENDING CONTROVERSY BEFORE ARBITRATORS, ADMISSIBLE.—1. Where there has been an offer by a party, either verbal or in writing, expressly stated to be made without prejudice, or where from the nature of the offer and the circumstances under which it was made, it may be reasonably inferred that the offer was but the expression of a willingness to pay money, allow credit, deliver property, or do some other thing, by way of compromise, to buy peace and prevent litigation, such offer is not evidence against the party making it; but if the admission of the existence of a fact be made, unless expressly without prejudice, or as a mere concession in order to induce a compromise, there is no rule of law which would exclude such admission as against the party making it. 2. In the case of a pending controversy before arbitrators, where the parties are contesting their rights as adversely as before any other tribunal, the statements and admissions made by a party contesting are admissible, and may be proved by an arbitaator before whom they were made, as by any other person hearing them. 3. Where in a controversy pending before arbitrators, one of the arbitrators made a statement of the account of one of the parties to the controversy, the items of which she furnished from her book then present, such statement is admissible in an action between the same parties in reference to the same disputed matter, to show of what the account consisted and the amount as then claimed. Opinion by ALVEY, J.—*Calvert v. Friebus.*

MONEY PAID INTO COURT AND DEPOSITED IN BANK TO CREDIT OF CAUSE, NOT LIABLE TO ATTACHMENT—WHEN EQUITY NOT AUTHORIRED TO RETAIN FUND PAID INTO COURT, TO ALLOW VALIDITY OF ASSIGNMENT THEREOF TO BE LITIGATED.—1. B, being entitled to a distributive share of the proceeds of his father's real estate sold under a decree, made several successive assignments of portions thereof. In January, 1872, the auditor stated an account distributing this share to the several assignees in the order of priority, and auditing to W, the last of them, the balance of $800.56 in part satisfaction of his assignment for $1,000, dated the 11th of April, 1871. This account was ratified on the 14th of October, 1872, and on the 24th of that month W assigned the amount thus audited to him to S. Afterward, there was a re-sale of the lands and the proceeds were all collected by the trustee and paid into court on or before the 9th of April, 1876. On the 22d of March, 1876, S assigned to G his interest in the amount that had been thus audited to W and under these assignments, which were duly filed in the case, G by petition asked for an order directing the clerk to draw his check for the payment of this sum to him. M, a creditor of S, recovered a judgment against him on the 19th of April, 1876, and on this judgment issued an attachment on the 20th of July, 1877, which, on the same day, was laid in the hands of the trustee; and at the same time he filed his petition in the cause averring the pendency of this attachment, charging that the assignment to G was made by S with intent to hinder, delay and defraud his creditors, that he was insolvent, and praying the court to declare the assignment void, and to direct the money to be paid to him, and to retain the fund for that purpose. The court passed an order dismissing this petition and directing the money to be paid to G. On appeal by M from this order, it was *held*, (1.) That the fund was not liable to the process of attachment. (2.) That the circumstances of the case did not authorize the court to retain the fund until the validity of the assignment by S to G could be litigated by the creditors of the former. (3.) That the court was right in dismissing the petition of M and directing the money to be paid to G. 2. Where real estate has been sold by a trustee under a decree of the court, and the auditor's account distributing the proceeds of sale stated and ratified, and such proceeds paid into court under an order to that effect, and deposited in bank to the credit of the cause, an attachment laid in the hands of the trustee to affect a part of such proceeds, can not be sustained. Opinion by MILLER, J.—*Mattingly v. Grimes.*

BOOK NOTICES.

A TREATISE ON THE LIABILITY OF STOCKHOLDERS IN CORPORATIONS. By SEYMOUR D. THOMPSON. St. Louis: F. H. Thomas & Co St. Louis.

The author of this treatise needs no introduction to our readers. The name of Mr. Thompson is associated so intimately with the foundation and conduct of this JOURNAL in the past—to his skill and labors so much of its prosperity has been due— that we had written a notice of his present work with the conviction that it could not fail to be read without more or less suspicion as to its unbiassed character. Because we have aimed to make the department of Book Notices independent and impartial, and to express our opinion of legal publications without fear, favor or affection, we thought it best to wait for the verdict of other reviewers before printing our own estimate of the work —one which our friendship for the author and our admiration for his learning, industry and ability had formed even before its publication.

The book has now been before the profession for nearly six weeks, and the notices which it has received from our cotemporaries are now at hand. Their opinion is our own. In the judgment of the ablest of our weekly exchanges, it will enhance the favorable impression made by the same author's excellent work on Homestead and Exemptions; in the words of the most excellent of the legal reviews: "Mr. Thompson has given the profession a treatise and not a mere digest. He has not hesitated to express his own opinion and conclusion upon many of the controverted questions considered in his work, at the same time he has presented clearly and fully all that could be desired by way of citation of authorities. The entire work reflects the utmost credit upon its critical and well-known author, and can not fail to obtain at the hands of the profession the favorable reception which its substantial merits so richly deserve."

This work is divided into twenty-two chapters, which are arranged under four parts. Part one, which treats of the nature and extent of the stockholder's liability, is devoted to a statement of the nature of corporations and an examination of the liability of their members in equity, and under particular statutes, and the constitutional questions which have arisen under them. In the second part, the manner in which

his liability is incurred is considered, and in part three the different ways in which the liability is divested—by breach of the contract of subscription, forfeiture transfer, bankruptcy and death—are each made the subject of separate chapters. The seven chapters in the fourth part relate to remedies, procedure and defenses, and are entitled, of the forum—when in equity and when at law; of the statutes of limitation; of conditions precedent to the right to proceed against stockholders; of parties; of certain questions of procedure and evidence; of certain defenses to actions against stockholders, and priorities among creditors. It contains 500 pages, exclusive of the index and table of cases. It is dedicated to Judge Bliss.

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

**** *The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

22. MARSHAL AS RECEIVER.—Is there any precedent for the appointment of a marshal as receiver? The marshal of the Northern District of Florida having, in several instances, been appointed receiver by the court, and last of all receiver of a long line of railroad, the matter has called forth a good deal of comment on the part of the profession. I desire to know whether there is any precedent for such an appointment. Lord Eldon when, on one occasion, it was proposed to make a master of the court committee of the estate of a lunatic, refused very decidedly, saying: "Though private persons may put them in the character of executors, the property of suitors is not by the judgment of this court to be put in the hands of its officers." 6 Vesey, 427. X.

Tallahassee, Florida.

23. REPEAL OF ACT.—In 1870, a statute was enacted which prescribed a certain line of procedure for the enforcement of rights thereby created. In 1874, the legislature passed an act providing a new and different remedy to enforce rights created and existing under the former law, and repealing inconsistent acts. In 1875, a new section was added to the seventy-eight sections of the aforesaid act of 1870, by due enactment of the following: "There is hereby added a new section to said act, to be known as section 79, and to read as follows: Sec. 79. All acts and parts of acts inconsistent with this act are hereby repealed." Query 1. Does this act of 1875 repeal the aforesaid act of 1874, if the latter is inconsistent with the aforesaid law of 1870 as enacted? 2. What effect ought to be given to this repealing section in construing the act of 1870 and statutes, *in pari materia*, enacted between the act of 1870 and the act of 1875 aforesaid? R.

St. Joseph, Mo.

ANSWERS.

No. 16.

[8 Cent. L. J. 307.]

A justice of the peace is not "liable to an action at the suit of a party" for an act done by him in a judicial capacity in a cause within his jurisdiction, unless in exercising his judgment he acts maliciously or from corrupt motives. 19 Ill. 242; 3 Con. 206; 17 Johns. 146; 19 Johns. 39: 3 Cai. 170; 2 John. Cas. 27; 7 Wend. 200; 10 Mass. 356; 5 Mass. 559; 1 N. H. 374; 33 N. H. 247; 49 N. H. 192; 38 Me. 530; Tappan (Ohio) 238; 7 Wall. 351. "If the act of the magistrate is done without jurisdiction it is a trespass; if within the jurisdiction the action rests upon the corruptness of the motives; and to establish this the act must be shown to be malicious." The power to "hear and determine" constitutes jurisdiction. 3 Ohio St. 494; 6 Pet. 709; 12 Pet. 718. C. R. GRANT.

Akron, Ohio.

NOTES.

THE SUPREME COURT OF THE UNITED STATES adjourned for the term on Monday last.——The Massachusetts legislature has passed a "civil damage" law. ——There has never been any doubt, says the English correspondent of the New York *Tribune*, in a recent letter, that the law lords would hold trustees in the City of Glagow Bank liable to the full extent, not only of their trust estates, but of their private estates. A decision to that effect has now been given. The only chance the trustees were thought to have lay in the affix of the words "trust-disponees" to their names on the share register. But the Lord Chancellor and his legal brethren hold that this description has no force in face of the partnership deed, which expressly declares that trustees shall be entitled to all the privileges and subject to all the liabilities of ordinary holders. Lord Selborne says it is not unjust to enforce this liability on account of this notice. Trustees must be supposed to have taken shares with full knowledge of the risk they ran. It is remarked also that in England itself all shareholders, whether trustees or otherwise, in an unlimited bank, stand on an absolutely equal footing. Admitting all this, and admitting that the law leaves the learned lords no option, it remains true that the case is one of hardship, and with all deference to Lord Selborne, of gross injustice. For there is no doubt that the law as it stands was framed with a very different object. Its object was to prevent a trustee from playing ducks and drakes with trust money, and then shielding himself as against a *cestui que trust*. It was meant that a trustee should be liable to the full amount of his private estate, not to the public, nor to the creditors or the bank, but to the person whose money he had speculatively invested. It turns out now that he became equally liable to the creditors, and trustees are swept away in the general ruin equally with those who traded for their own advantage. It is good law, if you like, but it is not good morals, and in the long run it would not prove good policy. Here are men who, without a thought of making a penny for themselves, bought City of Glasgaw Bank stock with the funds which they were bound to invest for those whose interests they were representing. They were legally compelled to take over the shares in their own names, and they are now legally compelled to pay out of their own money the debts of a bank in which not a farthing of their own money was invested. Who will consent to be a trustee hereafter in such circumstances?